Supreme Court, U.S.
FILED

No. 091512

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In The
Supreme Court of the United States

FREDERICK L. ENGLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the reversal of Mr. Engle's sentence by the United States Court of Appeals for the Fourth Circuit is contrary to this Court's holding in *Gall v. United States*, 552 U.S. 38 (2007), and should be summarily reversed.

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Petitioner Frederick L. Engle respectfully petitions the Supreme Court of the United States for a Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit entered and rendered on January 13, 2010.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is found at 592 F.3d 495 (2010). The opinion is reproduced in the Appendix to this Petition at 1-22.

BASIS OF JURISDICTION

The Judgment of the United States Court of Appeals for the Fourth Circuit was entered on January 13, 2010. On April 5, 2010, the Court granted Petitioner's application to extend the time to file this Petition through and including June 11, 2010. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The statutes involved are:

26 U.S.C. § 7201. Attempt to evade or defeat tax

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment

thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

18 U.S.C. § 3553. Imposition of sentence

(a) Factors to be considered in imposing a sentence. – The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for –

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines –

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement –

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments

issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3742

(e) Consideration. – Upon review of the record, the court of appeals shall determine whether the sentence –

(1) was imposed in violation of law;

(2) was imposed as result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that –

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept

> the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

STATEMENT OF THE CASE

Mr. Engle pled guilty to a Bill of Information charging him with one count of tax evasion under 26 U.S.C. § 7201. The Presentence Report determined that Mr. Engle's total offense level was 17, with a criminal history category of II based on two DUI convictions which involved conduct occurring in 1984 and 1987. At sentencing, the District Court determined that Mr. Engle's criminal history category was overstated, and reduced Mr. Engle's criminal history to category I. Appendix (hereinafter "App.") at 3. This resulted in an advisory Guidelines range of 24-30 months. App. at 3.

The District Court then varied from the Sentencing Guidelines advisory range, and sentenced Mr. Engle to a sentence of four years probation, including a term of 18 months community confinement with work release, allowing him to travel as required by his employment. App. at 4.

Thereafter, the District Court entered an Order vacating Mr. Engle's sentence based on the fact that the Bureau of Prisons would not allow Mr. Engle to travel to China as required by his work while Mr. Engle was serving the term of his community confinement. App. at 4.

In March 2008, a second sentencing hearing was held. App. at 5. Prior to this hearing, Mr. Engle filed a lengthy Sentencing Memorandum with the District Court which contained a detailed discussion of all of the relevant factors under 18 U.S.C. § 3553(a). At the sentencing hearing, counsel for Mr. Engle referred the Court to Mr. Engle's Sentencing Memorandum and his work history over the prior two years, including the fact that Mr. Engle had worked very hard to pay off $500,000 in debt and to generate money to pay his taxes, and that he currently had approximately $125,000 to pay for taxes owed. App. at 5, 41-42, 44. Counsel also discussed the fact that Mr. Engle had not lived an extravagant lifestyle; that his failure to pay taxes stemmed from a money management issue; and that Mr. Engle had provided for his children through child support and putting four children through college. App. at 5, 45-46. The United States, on the other hand, simply argued that the District Court should impose a sentence within the Guidelines range for two reasons: (1) the plea agreement stated that Mr. Engle would be sentenced according to the Guidelines (even though Mr. Engle did not plead guilty pursuant to a plea agreement); and (2) Mr. Engle's failure to repay the taxes owed. App. at 42-44. Other than these two brief arguments, the

United States did not specifically address any of the Section 3553(a) factors. See App. at 42-44.

Before imposing sentence, the District Court carefully considered the relevant factors under 18 U.S.C. § 3553(a). With regard to the nature and circumstances of the offense and history and characteristics of the Defendant, the District Court found that "this was more of a money management issue than anything else", and "the issue that I face as judge in trying to deal with this is to try to apply these factors in a way that appropriately punishes Mr. Engle but does not destroy his ability to pay that money." App. at 6, 47. The Court noted that:

> I find that a very difficult proposition because I think that there is a need to reflect the seriousness of the offense. I'm concerned that I'm not hearing any effort to try to balance this out other than let's put him in jail and take away his livelihood, which will destroy the ability of the government to collect the money. I don't see how that necessarily promotes respect for the law.
>
> Anything at all that happens to make him pay money affords some deterrence to criminal conduct. I don't see any need to protect the public from further crimes of the defendant. He has no need for vocational training or other correctional treatment unless, of course, I were to order him incarcerated, in

> which case he would need the vocational training.

App. at 6-7, 47. After considering the types of sentences available, the Court found it "appropriate to come up with a variance that would reflect [Mr. Engle's] ability to pay this money." App. at 7, 48.

> And I think that considering all of that – I don't see any unwarranted sentencing disparities. Look at the *Gall* case. This isn't a particularly terrible, seems to me, variance. It seems to be, then, that the sentence I originally thought about: [w]hich was four years probation, 18 months house arrest on electronic monitoring with work release, and he will be permitted to make trips to China as demanded by his employer.

App. at 7, 48. Further, in addition to the standard conditions of probation, the District Court ordered that Mr. Engle pay $25,000 immediately to the IRS, and that he pay an additional $100,000 within 90 days. App. at 7, 49. As reflected in the District Court's written Judgment, Mr. Engle was also ordered to "cooperate with the IRS to pay all outstanding taxes, interest and penalties" and "to comply with IRS conditions." App. at 32.

In its written Statement of Reasons, the District Court further elaborated on its sentence by noting that its sentence was outside the Guidelines range because of: "the nature and circumstances of

the offense and the history and characteristics of the defendant pursuant to 18 U.S.C. § 3553(a)(1)", and "to provide restitution to any victims of the offense (18 U.S.C. § 3553(a)(7))". The District Court additionally explained:

> Upon considering the advisory Sentencing Guidelines, the sentencing factors set forth in 18 U.S.C. § 3553(a) and *U.S. v. Booker*, the Court finds that a variance is appropriate as a sentence can be crafted that addresses the needs to: appropriately punish the defendant; provide adequate deterrence for such conduct; promote respect for the law; and will enable the defendant to repay the Internal Revenue Service. The Court finds that the defendant has the ability to make such repayment as long as he is able to maintain his current employment, is able to pay $25,000 immediately and will be able to pay an additional $100,000 within 90 days. In light of these factors, a probationary sentence appears [to] be both appropriate and reasonable.

Following the United States' appeal, on January 13, 2010, the Fourth Circuit entered its opinion, vacating the Judgment of the District Court. App. at 1-22. The Fourth Circuit determined that "the district court imposed a significantly below-Guidelines sentence, based on views that are at odds" with the policy statements contained in Chapter 2, Part T of the Sentencing Guidelines.

App. at 16. The Fourth Circuit found that the District Court's explanation of its sentence was insufficient to permit meaningful appellate review. App. at 17. In reaching this decision, the Fourth Circuit seemed to differ with the District Court's interpretation and balancing of the relevant sentencing factors. App. at 16-22. Indeed, the Fourth Circuit concluded that "the district court committed significant procedural error by minimizing of the seriousness of Engle's conduct, failing to consider the relevant policy statements and the need for general deterrence, and insufficiently explaining the reasons for its view that a term of imprisonment was not required." App. at 21.

The Fourth Circuit also concluded that the District Court abused its discretion by focusing so heavily on Mr. Engle's ability to pay restitution. App. at 19. According to the Fourth Circuit, "the district court's approach means that rich tax-evaders will avoid prison, but poor tax-evaders will almost certainly go to jail." App. at 19. Although it noted that it could "envision cases where the ability to pay restitution might properly be the deciding factor leading to a probationary sentence", App. at 18, the Fourth Circuit found that Mr. Engle's sentence "was substantively unreasonable because the sentencing decision was driven solely by Engle's ability to pay restitution." App. at 21.

REASONS FOR GRANTING THE WRIT

The reversal of Mr. Engle's sentence is contrary to this Court's holding in *Gall* and should be summarily reversed.

The reversal of Mr. Engle's sentence by the Fourth Circuit is inconsistent with the Court's holding in *Gall v. United States*, 552 U.S. 38 (2007), and should be summarily reversed. In *Gall*, the Court held that appellate courts "must review all sentences – whether inside, just outside, or significantly outside the Guidelines range – under a deferential abuse-of-discretion standard." 552 U.S. at 41. "When conducting this review, the court will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range." *Id.* If the sentence "is outside the Guidelines range, the court may not apply a presumption of unreasonableness." *Id.* Moreover, the appellate court:

> must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance. The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court.

Id. As noted by the Supreme Court:

> Practical considerations . . . underlie this legal principle. The sentencing judge is in a superior position to find facts and judge their import under § 3553(a) in the individual case. The judge sees and hears the evidence, makes credibility determinations, has full knowledge of the facts and gains insights not conveyed by the record. The sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before him than the Commission or the appeals court. Moreover, district courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines sentences than appellate courts do.

Id. at 51-52 (internal citation and quotations omitted); *see also Rita v. United States*, 551 U.S. 338, 357-58 (2007) ("The sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before him than the Commission or the appeals court."); *Kimbrough v. United States*, 552 U.S. 85, 109 (2007) (the sentencing court is "in a superior position to find facts and judge their import under § 3553(a) in each particular case") (internal quotations omitted); 18 U.S.C. § 3742 ("The court of appeals . . . shall accept the findings of fact of the district court unless they are clearly erroneous and . . . shall give due

deference to the district court's application of the guidelines to the facts.").

Here, the Fourth Circuit's reversal of Mr. Engle's sentence violates the holding of this Court in *Gall* because the Fourth Circuit has attempted to usurp the District Court's role in weighing the relevant factors under 18 U.S.C. § 3553(a). Contrary to the Fourth Circuit's contention that the District Court's sentence was insufficient to permit meaningful review, the record reveals that the District Court carefully balanced and analyzed the factors under Section 3553(a). As discussed, the Court first reviewed Mr. Engle's history and characteristics and found that the issue was more of "a money management issue than anything else." App. at 6, 47. The District Court then specifically discussed the seriousness of Mr. Engle's offense and the issue of deterrence.

> [T]he issue I face as a judge in trying to deal with this is to try to apply these factors in a way that appropriately punishes Mr. Engle but does not destroy his ability to pay that money. I find that a very difficult proposition because I think that there is a need to reflect the seriousness of the offense. I'm concerned that I'm not hearing any effort to try to balance this out other than let's put him in jail and take away his livelihood, which will destroy the ability of the government to collect the money. I don't see how that necessarily promotes respect for the law.

> Anything at all that happens to make him pay money affords some deterrence to criminal conduct. I don't see any need to protect the public from further crimes of the defendant. He has no need for vocational training or other correctional treatment unless, of course, I were to order him incarcerated, in which case he would need the vocational training.

App. at 6-7, 47.

Next, the District Court analyzed the issue of unwarranted sentencing disparities, comparing the case to *Gall* (where this Court determined that an even larger downward variance to a probationary sentence was reasonable).

> I don't see any unwarranted sentencing disparities. Look at the *Gall* case. This isn't a particularly terrible, seems to me, variance. It seems to be, then, that the sentence I originally thought about: [w]hich was four years probation, 18 months house arrest on electronic monitoring with work release, and he will be permitted to make trips to China as demanded by his employer.

App. at 7, 48.

In addition to the above factors, the District Court also considered the Defendant's ability to pay restitution in rendering its sentence. App. at 6-7,

47-48. Indeed, the District Court was required to consider this factor under 18 U.S.C. § 3553(a)(7).

Thus, the record makes clear that the District Court carefully considered the relevant factors under Section 3553(a), and there is ample discussion of these factors to permit appellate review. The Fourth Circuit's conclusion that the District Court failed to consider the seriousness of Mr. Engle's conduct, the relevant policy statements and the need for general deterrence, is more of a disagreement with how the District Court balanced and weighed these factors with the other factors under Section 3553(a). However, as discussed above, the District Court specifically discussed both the seriousness of Mr. Engle's conduct and the issue of deterrence in weighing the relevant factors.[1]

The District Court's analysis of the seriousness of Mr. Engle's offense is no different from the analysis of this factor by the district court in *Gall*. In that case, the Eighth Circuit, similar to the Fourth Circuit herein, concluded that, in departing from a Guidelines range of 30-37 months to a probationary sentence, the district court did not weigh the seriousness of Gall's offense because it

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[1]Although the District Court did not specifically reference the policy statements in Part 2T of the Guidelines, the District Court considered the seriousness of the offense and deterrence, which are the underpinnings of the policy statements. It should also be noted that the Government never raised or cited these policy statements at sentencing (or prior thereto). *See Gall*, 552 U.S. at 54 ("Had the prosecutor raised the issue, specific discussion of the point might have been in order, but it was not incumbent on the District Judge to raise every conceivably relevant issue on his own initiative.").

ignored the health risks posed by ecstasy. 552 U.S. at 53. This Court, however, found that the district court had plainly considered the seriousness of the offense based on the following general statement by the judge: "'The court, however, is bound to impose a sentence that reflects the seriousness of joining a conspiracy to distribute MDMA or ecstasy.'" *Id.* at 53-54.

Similarly, in the instant case, the District Court specifically noted that "there is a need to reflect the seriousness of the offense." App. at 6, 47. Although the Fourth Circuit may have disagreed with how the District Court weighed and balanced this factor with the other relevant factors under Section 3553(a), this is not a proper basis for reversing Mr. Engle's sentence. *See Gall*, 552 U.S. at 51 ("The fact that the appellate court might have reasonably concluded that a different sentence was appropriate is insufficient to justify reversal of the district court.").

Similarly, the Fourth Circuit's determination that Mr. Engle's sentence was driven solely by Mr. Engle's ability to pay restitution is inconsistent with the District Court's opinion in the case, and violates the principles of *Gall*. The Fourth Circuit concluded that the District Court's sentencing decision "was driven solely by Engle's ability to pay restitution" and creates an approach "where rich tax-evaders will avoid prison, but poor tax-evaders will almost certainly go to jail." App. at 19.

Once again, however, the Fourth Circuit has violated this Court's ruling in *Gall* by failing to

accord due deference to the weight that the District Court attached to the relevant Section 3553(a) factors and its ultimate sentence. Contrary to the Fourth Circuit's opinion, as discussed, the District Court carefully weighed and analyzed all of the relevant factors in reaching its sentence. Although Mr. Engle's ability to pay restitution was one of the factors to which the District Court attached significance, the record makes clear that this factor was not the sole factor supporting its sentence. As noted by the District Court in its Statement of Reasons, a sentence below the Guidelines range was deemed reasonable based on "the nature and circumstances of the offense and the history and characteristics of the defendant pursuant to 18 U.S.C. § 3553(a)(1)," and "to provide restitution to any victims of the offense (18 U.S.C. § 3553(a)(7))." Moreover, not only was the District Court allowed to consider a defendant's ability to pay restitution in fashioning its sentence, it was required to do so. See 18 U.S.C. § 3553(a)(7). The Fourth Circuit's difference in opinion as to the weight assigned to this factor by the District Court is a violation of the due deference that appellate courts are required to give district court's analysis of the Section 3553(a) factors under *Gall*.

In short, this case is little different from *Gall*. In that case, despite the defendant's conviction on charges of conspiracy to distribute illegal drugs, the district court found that "any term of imprisonment in this case would be counter effective by depriving society of the contributions of the Defendant," who had taken measures to "forge a new life." 552 U.S. at 44. Consequently, the district court varied from a

Guidelines range of 30-37 months imprisonment to a sentence of probation. *Id.* at 43. On appeal, the Eighth Circuit - similar to the Fourth Circuit in this case - disagreed with the weight that the district court assigned to the Section 3553(a) factors, including the weight attached by the district court to the seriousness of the offense. *Id.* at 45-46. However, the Court determined that the district court's decision was entitled to due deference and was reasonable. *Id.* at 59-60.

Here, although the Fourth Circuit has characterized Mr. Engle's sentence as a "significantly below-Guidelines sentence," *see* App. at 16, the downward variance in this case was less than the downward variance in *Gall* (which is a fact noted by the District Court in its analysis). Because the District Court carefully weighed and balanced the relevant factors under Section 3553(a), its sentencing decision is entitled to substantial discretion. The Fourth Circuit's opinion fails to give due deference to the District Court's sentence and violates the principles of *Gall*.

CONCLUSION

For the reasons stated herein, this Honorable Court should grant the Petitioner's Petition for Writ of Certiorari and summarily reverse the decision of the United States Court of Appeals for the Fourth Circuit.

This the 10th day of June, 2010.

Respectfully Submitted,

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ENTERED: January 13, 2010

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
v. No. 08-4497
FREDERICK L. ENGLE,
Defendant-Appellee.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte.
Graham C. Mullen, Senior District Judge.
(3:04-cr-00055-GCM-DCK-1)

Argued: September 23, 2009

Decided: January 13, 2010

Before TRAXLER, Chief Judge, WILKINSON, Circuit Judge, and Margaret B. SEYMOUR, United States District Judge for the District of South Carolina, sitting by designation.

Vacated and remanded by published opinion. Chief Judge Traxler wrote the opinion, in which Judge Wilkinson and Judge Seymour joined.

COUNSEL

ARGUED: Matthew Theodore Martens, OFFICE OF THE UNITED STATES ATTORNEY, Charlotte, North Carolina, for Appellant. James Frank Wyatt, III, WYATT & BLAKE, LLP, Charlotte, North Carolina, for Appellee. **ON BRIEF:** Gretchen C. F. Shappert, United States Attorney, Charlotte, North Carolina, for Appellant. Robert A. Blake, Jr., WYATT & BLAKE, LLP, Charlotte, North Carolina, for Appellee.

OPINION

TRAXLER, Chief Judge:

Frederick Engle pleaded guilty to tax evasion, *see* 26 U.S.C.A. § 7201 (West 2002), and the district court sentenced him to four years' probation, conditioned on the service of eighteen months' home detention with work release and international travel privileges. The government appeals, challenging the reasonableness of the sentence. For the reasons set forth below, we vacate the sentence and remand for resentencing.

I.

The information presented during the proceedings below and set out in the presentence report establish that Engle, who was 64 years old when he pleaded guilty, had worked as a manufacturing representative in the shoe industry for more than 30 years. His business required frequent and extensive overseas travel every year.

The criminal information charged Engle with tax evasion for the 1998 tax year only, although the information alleged that Engle had evaded taxes for sixteen years between 1984 and 2002 and owed taxes of more than $600,000. With interest and penalties included, Engle's total tax liability exceeded $2 million. Engle's actions to avoid taxes included providing false information to the Internal Revenue Service, placing assets in others' names, and funneling income through shell corporations that he controlled.

Engle pleaded guilty to the information in 2004 and proceeded to sentencing almost two years later, in February 2006. Based on a total offense level of 17 and a category II criminal history, the presentence report calculated Engle's advisory sentencing range as 27-33 months. The district court concluded that Engle's criminal history was overstated and therefore reduced Engle's criminal history to category I, yielding an advisory sentencing range of 24-30 months.

The government sought a term of imprisonment within the advisory range. The government noted that it prosecutes relatively few tax evasion cases and generally does so only "under the most egregious circumstances." J.A. 31. The government argued that Engle had avoided his tax obligations for sixteen years and that a period of incarceration was necessary to provide adequate deterrence to others. The district court, however, was primarily concerned with making Engle pay his tax debt. *See* J.A. 31c ("Right now I've got this guy and I can try to figure out a way to get the money out of him."). The court concluded that Engle's

ability to earn significant amounts of money warranted a variance sentence:

> I'm satisfied that a variance is appropriate under the circumstances for the reason that I believe that I can craft a sentence that addresses both the need to deprive this defendant of his physical liberty for a significant period of time . . . and leave him free to attempt to generate the income that would permit him to settle up with the Internal Revenue Service.
>
> I'm sympathetic to the government's position. Absent . . . the apparent ability to generate the income, I would simply impose a Guideline sentence and be done with it.

J.A. 31e. The court sentenced Engle to four years' probation, conditioned on confinement for eighteen months in a community corrections center. The court directed that Engle, while in the community corrections center, would be permitted to travel to China as required by his job.

Shortly after the district court announced the sentence, the court learned that the Bureau of Prisons would not permit international travel while Engle was housed in a community corrections center. The district court therefore vacated the sentence and indicated that Engle would be resentenced at a later date.

The district court finally reconvened the sentencing proceeding in March 2008, more than two years after the original sentencing proceeding. At the hearing, the district court asked whether Engle had yet paid any of the taxes owed. Counsel for Engle stated that he had $25,000 in his trust account available for immediate payment and that Engle would be receiving $100,000 in commissions in the next month or two that could be applied to the taxes owed. The government, however, pointed out that in the four years since pleading guilty and the two years since the first sentencing proceeding, Engle had paid only $480 on the taxes owed, and that payment was made only two weeks earlier, after Engle was contacted by the IRS. The government again argued that a sentence of imprisonment within the range suggested by the Guidelines was appropriate, given Engle's conduct. Defense counsel argued that Engle's tax problems were not the result of an extravagant lifestyle, but instead were simply "money management" problems, J.A. 61, spurred on by the costs of three divorces and the need to put his children through college and support his current wife and her children. Counsel for Engle noted that since the first sentencing proceeding Engle had repaid a $500,000 advance owed to his employer and now had $125,000 available to repay the government. Counsel argued that Engle had "done the best he can under the circumstances" and that he now had the ability "to repay every cent the government is owed in terms of this criminal case, as well as any civil proceedings that may ensue." J.A. 60.

The district court asked the government whether it wanted "blood or money," J.A. 60, and the

government again stated that it wanted a sentence within the range set by the Guidelines. The court believed the government was thus asking for "[b]lood[,] [b]ecause if I take away his income, you're not going to get" the money. J.A. 60. The court ultimately decided that a sentence similar to the one previously imposed would be appropriate. The court explained its reasoning:

> In considering the nature and circumstances of the offense and the history and characteristics of the defendant, I [agree that this is] more of a money management issue than anything else, [and] the issue that I face as judge in trying to deal with this is to try to apply these factors in a way that appropriately punishes Mr. Engle but does not destroy his ability to pay that money.
>
> I find that a very difficult proposition because I think that there is a need to reflect the seriousness of the offense. I'm concerned that I'm not hearing any effort to try to balance this out other than let's put him in jail and take away his livelihood, which will destroy the ability of the government to collect the money. I don't see how that necessarily promotes respect for the law
>
> Anything at all that happens to make him pay money affords some deterrence to criminal conduct. I don't see any need to protect the public from

> further crimes of the defendant. He has no need for vocational training or other correctional treatment unless, of course, I were to order him incarcerated, in which case he would need the vocational training.
>
> * * *
>
> It . . . seems to me to be appropriate to come up with a variance that would reflect this man's ability to pay this money. And I think that considering all of that — I don't see any unwarranted sentencing disparities. Look at the *Gall* case. This isn't a particularly terrible . . . variance. It seems to be, then, that the sentence I originally thought about[, w]hich was fours years probation, 18 months house arrest on electronic monitoring with work release, and he will be permitted to make trips to China as demanded by his employer.

J.A. 63-64. The district court directed that the $25,000 held by Engle's attorney be paid to the IRS immediately and that Engle pay the $100,000 in expected commissions within 90 days. The district court, however, declined to order full restitution, believing that the IRS "has adequate means to do that." J.A. 65.

The government appeals the sentence imposed by the district court. According to the government, the district court's probationary sentence is

inconsistent with the policy considerations underlying prosecutions for income tax evasion, and Engle's substantial earning potential was not a sufficient reason to decline to impose a sentence of imprisonment as recommended by the Guidelines.

II.

Since the Supreme Court's decision in *Booker*, the Sentencing Guidelines are no longer mandatory but are instead "effectively advisory." *United States v. Booker*, 543 U.S. 220, 245 (2005). When sentencing criminal defendants in the post-*Booker* world, district courts must first correctly calculate the defendant's sentence under the Sentencing Guidelines. The court must then allow the parties to argue for what they believe to be an appropriate sentence and consider those arguments in light of the factors set forth in 18 U.S.C.A. § 3553(a) (West 2000 & Supp. 2009). *See Gall v. United States*, 552 U.S. 38, 49-50 (2007); *United States v. Abu Ali*, 528 F.3d 210, 260 (4th Cir. 2008). Sentencing courts are statutorily required to state their reasons for imposing sentence. *See* 18 U.S.C.A. § 3553(c) (West Supp. 2009). Although a comprehensive, detailed opinion is not necessarily required, the court's explanation must nonetheless be sufficient "to satisfy the appellate court that [the district court] has considered the parties' arguments and has a reasoned basis for exercising [its] own legal decisionmaking authority." *Rita v. United States*, 551 U.S. 338, 356 (2007); *see also Gall*, 552 U.S. at 50 ("After settling on the appropriate sentence, [the district court] must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing.").

District courts have "sizeable discretion" when sentencing, *Abu Ali*, 528 F.3d at 266, and appellate review is limited to determining whether the sentence imposed is reasonable, *see Gall*, 552 U.S. at 40-41.

An appellate court's reasonableness review has procedural and substantive components. The procedural component requires us to ensure that the district court

> committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence including an explanation for any deviation from the Guidelines range.

Id. at 51. The substantive component of reasonableness review requires us to "take into account the totality of the circumstances." *Id.* While we may consider the extent of any variance from the advisory Guidelines range, we "must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance." *Id.* Given the institutional advantages of district courts with regard to sentencing matters, *see United States v. Evans*, 526 F.3d 155, 166 (4th Cir.), *cert. denied*, 129 S. Ct. 476 (2008), all sentences, including sentences "significantly outside the Guidelines range," must be reviewed "under a

deferential abuse-of-discretion standard." *Gall*, 552 U.S. at 41.

In challenging the sentence imposed by the district court, the government advances several interrelated arguments. The government contends that the district court failed to properly consider all of the factors set forth in 18 U.S.C.A. § 3553(a). According to the government, the district court failed to properly consider the seriousness of Engle's conduct and the need for deterrence, but at the same time placed too much emphasis on restitution and Engle's financial ability to pay restitution. The government argues that the court's emphasis on restitution is inconsistent with the policy considerations underlying the Guidelines' sentencing recommendations for tax crimes and that granting lenience to defendants with the financial ability to satisfy large restitution awards amounts to bad public policy. The government also argues that, given the dispositive weight that the district court assigned to the need for restitution, the court's refusal to order restitution renders the sentence unreasonable.

A.

We begin with the government's claim that the court failed to properly consider all of the § 3553(a) factors. Specifically, the government argues that the district court failed to consider or failed to properly consider the seriousness of the offense, *see* 18 U.S.C.A. § 3553(a)(2)(A); the need for the sentence to provide sufficient deterrence, *see id.* § 3553(a)(2)(B); the policy statements issued by the Sentencing Commission, *see id.* § 3553(a)(5); and the

need to avoid unwarranted sentence disparities, *see id.* § 3553(a)(6).[1]

Although the district court mentioned the seriousness of the offense, the court did so only in passing, without any real explanation of how the court believed that factor affected its sentencing decision. *See* J.A. 63 ("I think that there is a need to reflect the seriousness of the offense."). And while the court mentioned disparities, it was only to say that there were no unwarranted disparities. *See* J.A. 64. Since the district court made it clear that defendants without Engle's earning capacity would have been sentenced to prison, something more than a denial of even the existence of disparities would seem to be required. *See United States v. Carter*, 564 F.3d 325, 329 (4th Cir. 2009) ("[T]he district court need not robotically tick through § 3553(a)'s every subsection. But at the same time, a talismanic recitation of the § 3553(a) factors without application to the defendant being sentenced does not demonstrate reasoned decisionmaking or provide an adequate basis for appellate review." (citation and internal quotation marks omitted)).

We need not decide, however, whether the district court's cursory treatment of these factors

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[1] The government describes its arguments as going to the *substantive* reasonableness of Engle's sentence. In our view, many of the government's arguments — such as its claim that the district court failed to con-sider all of the § 3553(a) factors — are more properly viewed as challenging the procedural reasonableness of the sentence. *See Gall*, 552 U.S. at 51. We will, of course, consider the government's arguments on their merits, without regard to whether the government attached the correct descriptive label to those arguments.

would in and of itself be enough to require resentencing. Questions about the seriousness of the offense and the possibility of unwarranted sentencing disparities are interrelated with what we believe to be the more important issue in this case—the district court's failure to consider the relevant policy statements issued by the Sentencing Commission.

As the government notes, the policy statements issued by the Sentencing Commission make it clear that the Commission views tax evasion as a serious crime and believes that under the pre-Guidelines practice, too many probationary sentences were imposed for tax crimes. *See* U.S.S.G. Ch. 1, Pt. A, introductory cmt. 4(d) (1998) ("Under pre-guidelines sentencing practice, courts sentenced to probation an inappropriately high percentage of offenders guilty of certain economic crimes, such as theft, tax evasion, antitrust offenses, insider trading, fraud, and embezzlement, that in the Commission's view are 'serious.'"). The policy statements also reflect the Commission's view that general deterrence — that is, deterring those other than the defendant from committing the crime — should be a primary consideration when sentencing in tax cases. As the Commission has explained,

> The criminal tax laws are designed to protect the public interest in preserving the integrity of the nation's tax system. Criminal tax prosecutions serve to punish the violator and promote respect or the tax laws. Because of the limited number of criminal tax prosecutions relative to the

> estimated incidence of such violations, deterring others from violating the tax laws is a primary consideration underlying these guidelines. Recognition that the sentence for a criminal tax case will be commensurate with the gravity of the offense should act as a deterrent to would-be violators.

U.S.S.G. Ch. 2, Pt. T, introductory cmt. (1998). The policy statements likewise make it clear that the Commission believes that there must be a real risk of actual incarceration for the Guidelines to have a significant deterrent effect in tax evasion cases. The Guidelines therefore

> classify as serious many offenses for which probation was frequently given and provide for at least a short period of imprisonment in such cases. *The Commission concluded that the definite prospect of prison, even though the term may be short, will serve as a significant deterrent*, particularly when com-pared with pre guidelines practice where probation, not prison, was the norm.

Id. at Ch. 1, Pt. A, introductory cmt. 4(d) (1998) (emphasis added). Given the nature and number of tax evasion offenses as compared to the relatively infrequent prosecution of those offenses, we believe that the Commission's focus on incarceration as a means of third-party deterrence is wise. The vast majority of such crimes go unpunished, if not undetected. Without a real possibility of imprisonment, there would be little incentive for a

wavering would-be evader to choose the straight-and-narrow over the wayward path.

The district court, however, made no mention of these specific policy statements, nor did the court more broadly acknowledge the general principles underlying the Guidelines' approach to sentencing for serious economic crimes like tax evasion. The only statements made by the district court touching on these areas seem to suggest that the district court fundamentally disagreed with the Guidelines' approach in these cases. The court mentioned the seriousness of the offense only to chastise the government for remaining firm in its view that a term of imprisonment was warranted, *see* J.A. 63, and the court seemed to effectively reject *any* need for third-party deterrence with its statement that "[a]*nything at all* that happens to make him pay money affords some deterrence to criminal conduct," J.A. 63 (emphasis added).

We recognize that in the post-*Booker* sentencing world, district courts must give due consideration to relevant policy statements, but those policy statements are no more binding than any other part of the Guidelines. Accordingly, district courts may "vary from Guidelines ranges based solely on policy considerations, including disagreements with the Guidelines." *United States v. Kimbrough*, 552 U.S. 85, 101 (2007) (internal quotation marks and alteration omitted). Nonetheless, "when a non-Guidelines sentence runs directly counter to the Commission's position, either because the district court has erroneously applied the departure provisions or because it has determined in a 'mine-run case' that the Guidelines

range fails to reflect the § 3553(a) factors, "'closer review may be in order.'" *Evans*, 526 F.3d at 165 n.4 (quoting *Kimbrough*, 552 U.S. at 109). If "closer review" of a district court's policy disagreement is ever warranted, we believe it would be appropriate in this case. Nonetheless, given the facts of the case and the degree of the variance, we find the record insufficient to permit even the routine review for procedural reasonableness required in cases involving an outside-the-Guidelines sentence. *See Gall*, 552 U.S. at 50 (explaining that if the sentencing judge "decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance. We find it uncontroversial that a major departure should be supported by a more significant justification than a minor one."); *cf. Rita*, 551 U.S. at 356-57 ("[W]hen a judge decides simply to apply the Guidelines to a particular case, doing so will not necessarily require lengthy explanation.").

This case is a "mine-run" tax-evasion case only in the most generous (to Engle) understanding of that phrase. Engle evaded his tax responsibilities for sixteen years, altered tax returns prepared by his accountants, directed that income to him be paid to shell corporations in an effort to avoid withholding and reporting requirements, and lied to the IRS

about the existence of these corporate accounts.[2] Yet, with facts that could perhaps be viewed as warranting an above-Guidelines sentence, the district court imposed a significantly below-Guidelines sentence, based on views that are at odds with the clearly expressed policy views of the Sentencing Commission. The district court did not acknowledge the policy statements, and there is nothing in the statements made by the court during sentencing that offer any insight into *why* the court believed that a prison term was not required. There is no explanation of why the court believed that allowing Engle to continue to work and travel was consistent with the seriousness of his offense or that it would provide adequate deterrence for other would-be tax evaders. Moreover, as noted above, for more than four years after pleading guilty to tax evasion, Engle continued to work and travel, yet he paid *nothing* towards his tax debt. It was not until two weeks before the second sentencing hearing that Engle made the first payment (of less than $500),

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[2] These facts make it difficult to accept the district court's characterization of the offense and Engle's conduct as merely reflecting "money management" problems. The post-*Booker* level of deference that must be accorded to a district court's sentencing decisions, of course, does not insulate the court's factual findings from appellate review. *See Gall*, 552 U.S. at 51 (explaining that a district court makes a procedural error if it "select[s] a sentence based on clearly erroneous facts"); *see also United States v. Harvey*, 532 F.3d 326, 336-37 (4th Cir. 2008) ("In assessing whether a sentencing court properly applied the Guidelines, we review the court's factual findings for clear error and its legal conclusions *de novo*. Clear error occurs when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (citations and internal quotation marks omitted)).

and even that nominal payment was spurred on by an inquiry from the IRS. The absence of any payments during a time when there is the greatest incentive for a defendant to be on his best behavior raises questions about the district court's belief that restitution would provide sufficient deterrence to Engle himself.

Under these circumstances, we cannot determine whether the sentence is reasonable without a fuller explanation of the reasoning behind the district court's view that a term of imprisonment as recommended by the Guidelines was not warranted and why restitution alone would provide adequate deterrence in this case.[3] *See Gall*, 552 U.S. at 50 (noting that district court "must make an individualized assessment based on the facts presented"). Because the district court's explanation of its decision to vary significantly from the Guidelines' sentencing recommendation is insufficient to permit meaningful appellate review, we must vacate the sentence and remand for new sentencing further proceedings.

B.

Although the procedural deficiencies addressed above require us to vacate the sentence,

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[3] Engle's failure to make any significant payment on his tax debt during the four-year period before sentencing likewise raises questions about the district court's refusal to order full restitution, an order that would carry with it significant benefits from the government's perspective with regard to collection and enforcement. On remand, the district court should reconsider this issue and provide a more detailed explanation should it again conclude that a restitution order is not required.

we believe it proper to address a substantive aspect of the district court's sentence that may arise on remand — the court's near-exclusive focus on Engle's financial ability to pay restitution. *See United States v. Cavera*, 550 F.3d 180, 191 (2d Cir. 2008) (en banc) ("At the substantive stage of reasonableness review, an appellate court may consider whether a factor relied on by a sentencing court can bear the weight assigned to it.").

It may well be that, in many cases, the sentencing decision will ultimately turn on a single § 3553(a) factor — for example, when most of the factors point only lightly in favor of a Guidelines or variance sentence, but one factor points very strongly towards one sentence or the other. And we can envision cases where the ability to pay restitution might properly be the deciding factor leading to a probationary sentence. For example, if the Guidelines calculation yields a short sentencing range, a district court might well elect a probationary sentence in order to permit the defendant to continue working so as to satisfy a restitution award, particularly if the restitution is owed to a private party. In such cases, the deference owed to district courts' sentencing decisions might require appellate courts to affirm the sentence, even if the appellate court would have weighed the factors differently. *See Gall*, 552 U.S. at 51 (requiring appellate courts to "give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance"); *Cavera*, 550 F.3d at 189, 191 ("[W]e will not substitute our own judgment for the district court's on the question of what is sufficient to meet the § 3553(a) considerations in any particular case," and "we do

not consider what weight we would ourselves have given a particular factor."). Nonetheless, "inherent in the concept of reasonableness is the notion that the rare sentence may be unreasonable, and inherent in the idea of discretion is the notion that it may, on infrequent occasion, be abused." *Abu Ali*, 528 F.3d at 266 (citation and internal quotation marks omitted). And in this case, we believe the district court abused its discretion by focusing so heavily on Engle's ability to pay restitution.

The district court made it clear that, but for Engle's earning capacity, it would have imposed a within-Guidelines sentence of imprisonment: "[A]bsent the apparent ability to generate the income, I would simply impose a Guideline sentence and be done with it." J.A. 31e. In fact, other statements suggested that the district court believed not simply that Engle's payment of his tax debt was desirable, but that it was *improper* for the government to seek anything other than restitution. *See* J.A. 60 (asking the government whether the government wanted "blood or money"); J.A. 63 ("I'm concerned that I'm not hearing any effort to try to balance this out other than let's put him in jail and take away his livelihood, which will destroy the ability of the government to collect the money. I don't see how that necessarily promotes respect for the law.").

Reduced to its essence, the district court's approach means that rich tax-evaders will avoid prison, but poor tax-evaders will almost certainly go to jail. Such an approach, where prison or probation depends on the defendant's economic status, is impermissible. That was the consistent view of

courts before *Booker* and its progeny. *See, e.g.*, *United States v. DeMonte*, 25 F.3d 343, 347 (6th Cir. 1994) ("[W]e may not sentence a poor convict more harshly than a rich convict simply because the rich convict is better able to make restitution."); *United States v. Bolden*, 889 F.2d 1336, 1340 (4th Cir. 1989) ("[W]e do not think that the economic desirability of attempting to preserve [the defendant's] job so as to enable him to make restitution warrants a downward adjustment from the guidelines."); *cf.* U.S.S.G. § 5H1.10, p.s. (forbidding con-sideration of defendant's socio-economic status as a basis for departure).

While *Booker* and *Gall* have worked a substantial change in the manner in which sentencings are conducted and have vested district courts with substantially broader discretion than they possessed under the former sentencing regime, we do not believe the change wrought by *Booker* was so great that it permits district courts to rest a sentencing decision exclusively on such constitutionally suspect grounds. *See Bearden v. Georgia*, 461 U.S. 660, 661 (1983) (noting the "impermissibility of imprisoning a defendant solely because of his lack of financial resources"); *United States v. Seacott*, 15 F.3d 1380, 1389 (7th Cir. 1994) ("Allowing sentencing courts to depart downward based on a defendant's ability to make restitution would thwart the intent of the guidelines to punish financial crimes through terms of imprisonment by allowing those who could pay to escape prison. It would also create an unconstitutional system where the rich could in effect buy their way out of prison sentences."); *cf. United States v. Tomko*, 562 F.3d 558, 570 (3d Cir. 2009) (*en banc*) (post-*Gall* case

affirming probationary sentence in tax evasion case; rejecting the government's claim that the district court permitted the defendant "to buy his way out of prison" because "the record exhibits no connection between the fine imposed and the failure to incarcerate").

We do not mean to suggest that the economic status of a defendant is never relevant in sentencing. It is certainly relevant when setting the amount of a fine or establishing a payment schedule, and it may well have relevance in other ways in other cases. And while we recognize the broad discretion possessed by district courts with regard to sentencing matters, we have no difficulty concluding that in this case, the district court abused that discretion. Accordingly, we conclude that the sentence imposed by the district court was substantively unreasonable because the sentencing decision was driven solely by Engle's ability to pay restitution.

III.

To summarize, we conclude that the district court committed significant procedural error by minimizing of the seriousness of Engle's conduct, failing to consider the relevant policy statements and the need for general deterrence, and insufficiently explaining the reasons for its view that a term of imprisonment was not required. We also conclude that the sentence imposed was substantively unreasonable because of the district court's improper focus on Engle's financial ability to pay restitution. Accordingly, we hereby vacate Engle's sentence and

remand for further proceedings before a different district court judge.[4]

VACATED AND REMANDED

[4] The district judge in this case also presided over the tax-evasion trials and sentencings in *United States v. Baucom*, No. 08-4493, and *United States v. Davis*, No. 08-4512, cases that, though not formally consolidated with this case, were argued before this court seriatim with this appeal. In the sentencing hearing for Davis, the district judge, who has taken senior status, stated that he no longer intended to handle criminal matters.

ENTERED: January 13, 2010

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-4497 (3:04-cr-00055-GCM-DCK-1)

UNITED STATES OF AMERICA,

Plaintiff – Appellant

v.

FREDERICK L. ENGLE,

Defendant – Appellee

J U D G M E N T

In accordance with the decision of this Court, the judgment of the District Court is vacated. This case is remanded to the District Court for further proceedings consistent with the Court's decision.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

ENTERED: April 4, 2008

United States District Court
For The Western District of North Carolina

UNITED STATES OF AMERICA

v.

FREDERICK L. ENGLE

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: DNCW304CR000055-001

USM Number: 19590-058
James F. W yatt, III
Defendant's Attorney

THE DEFENDANT:

X pleaded guilty to count(s) 1.
___ Pleaded nolo contendere to count(s) which was accepted by the court.
__ Was found guilty on count(s) after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title and Section

26 U.S.C. 7201

Nature of Offense

Tax Evasion

Date Offense Concluded

4/15/1999

Counts

1

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984, United States v. Booker, 125 S.Ct. 738 (2005), and 18 U.S.C. § 3553(a).

__ The defendant has been found not guilty on count(s).

__ Count(s) (is)(are) dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay monetary penalties, the defendant shall notify the court and United States

attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Sentence: 3/12/2008

/s/
Graham C. Mullen
United States District Judge

Date: April 4, 2008

Defendant: FREDERICK L. ENGLE
Case Number: DNCW304CR000055-001

PROBATION

The defendant shall be on probation for a term of FOUR (4) YEARS.

The condition for mandatory drug testing is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

STANDARD CONDITIONS OF SUPERVISION

The defendant shall comply with the standard conditions that have been adopted by this court and any additional conditions ordered.

1. The defendant shall not commit another federal, state, or local crime.

2. The defendant shall refrain from possessing a firearm, destructive device, or other dangerous weapon.

3. The defendant shall pay any financial obligation imposed by this judgment remaining unpaid as of the commencement of the sentence of probation or the term of supervised release on a schedule to be established by the court.

4. The defendant shall provide access to any personal or business financial information as requested by the probation officer.

5. The defendant shall not acquire any new lines of credit unless authorized to do so in advance by the probation officer.

6. The defendant shall not leave the Western District of North Carolina without the permission of the Court or probation officer.

7. The defendant shall report in person to the probation officer as directed by the Court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

8. A defendant on supervised release shall report in person to the probation officer in the district to which he or she is released within 72 hours of release from custody of the Bureau of Prisons.

9. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

10. The defendant shall support his or her dependents and meet other family responsibilities.

11. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other activities authorized by the probation officer.

12. The defendant shall notify the probation officer within 72 hours of any change in residence or employment.

13. The defendant shall refrain from excessive use of alcohol and shall not unlawfully purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as duly prescribed by a licensed physician.

14. The defendant shall participate in a program of testing and treatment or both for substance abuse if directed to do so by the probation officer, until such time as the defendant is released from the program by the probation officer; provided, however, that defendant shall submit to a drug test within 15 days of release on probation or supervised release and at least two periodic drug tests thereafter for use of any controlled substance, subject to the provisions of 18:3563(a)(5) or 18:3583(d), respectively.

15. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

16. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

17. The defendant shall submit his person, residence, office or vehicle to a search, from time to time, conducted by any U.S. Probation Officer and such other law enforcement personnel as the probation officer may deem advisable, without a warrant; and failure to submit to such a search may be grounds for revocation of probation or supervised release. The defendant shall warn other residents or occupants that such premises or vehicle may be subject to searches pursuant to this condition.

18. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed by the probation officer.

19. The defendant shall notify the probation officer within 72 hours of defendant's being arrested or questioned by a law enforcement officer.

20. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court.

21. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

22. If the instant offense was committed on or after 4/24/96, the defendant shall notify the probation officer of any material changes in defendant's economic circumstances which may affect the defendant's ability to pay any monetary penalty.

23. If home confinement (home detention, home incarceration or curfew) is included you may be required to pay all or part of the cost of the electronic monitoring or other location verification system program based upon your ability to pay as determined by the probation officer.

24. The defendant shall cooperate in the collection of DNA as directed by the probation officer.

ADDITIONAL CONDITIONS:

25. The Defendant shall serve eighteen (18) months home detention with work release, and shall remain in place of residence except for employment including travel permission to China.

26. The Defendant shall file tax returns as required by law and provide the U.S. Probation Office with proof thereof; and the Defendant shall cooperate with the IRS to pay all outstanding taxes, interest and penalties.

27. The Defendant is required to comply with IRS conditions.

Defendant: FREDERICK L. ENGLE
Case Number: DNCW304CR000055-001

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the Schedule of Payments.

ASSESSMENT FINE

$100.00 (Paid)

FINE

$0.00

RESTITUTION

To be determined by the IRS

The defendant shall pay interest on any fine or restitution of more than $2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

___ The interest requirement is waived.

___ The interest requirement is modified as follows:

COURT APPOINTED COUNSEL FEES

___ The defendant shall pay court appointed counsel fees.

___ The defendant shall pay $ _ ___ towards court appointed fees.

Defendant: FREDERICK L. ENGLE
Case Number: DNCW304CR000055-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A X Lump sum payment of $ 25,000.00 due immediately, followed by $100,000.00 due in 90 days. Remaining balance to be paid through IRS.

__ not later than , or
__ in accordance __ ©, __ (D) below; or

B Payment to begin immediately (may be combined with ©, (D) below); or

C __ Payment in equal _____ (e.g. weekly, monthly, quarterly) installments of $ _____ to commence _____ (e.g. 30 or 60 days) after the date of this judgment; or

D __ Payment in equal ___ (e.g. weekly, monthly, quarterly) installments of $ to commence (e.g. 30 or 60 days) after release from imprisonment to a term of supervision. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. Probation Officer shall pursue collection

of the amount due, and may request the court to establish or modify a payment schedule if appropriate 18 U.S.C. § 3572.

Special instructions regarding the payment of criminal monetary penalties:

__ The defendant shall pay the cost of prosecution.

The defendant shall pay the following court costs:

__ The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States District Court Clerk, 401 West Trade Street, Room 210, Charlotte, NC 28202, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. All criminal monetary penalty payments are to be made as directed by the court.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution,

(6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Defendant: FREDERICK L. ENGLE
Case Number: DNCW304CR000055-001

RESTITUTION PAYEES

The defendant shall make restitution to the following payees in the amounts listed below:

NAME OF PAYEE

Internal Revenue Service

AMOUNT OF RESTITUTION ORDERED

To be determined by IRS

__ The defendant is jointly and severally liable with co-defendants for the total amount of restitution.

__ Any payment not in full shall be divided proportionately among victims.

ENTERED: March 12, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH
CAROLINA CHARLOTTE DIVISION

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
vs	)
	)
FREDERICK L. ENGLE,	)
	)
Defendant.	)
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MARCH 12, 2008

TRANSCRIPT OF SENTENCING HEARING
BEFORE THE HONORABLE
GRAHAM C. MULLEN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE UNITED STATES:

MATTHEW T. MARTENS, ESQ.
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debt, and that money was simply held back on him, so he had no access to it.

THE COURT: Is the 100,000 really available? I mean, won't he owe taxes on the 100,000. I mean, isn't he in one of those wonderful revolving door never-never lands with whatever money he gets, he owes more taxes?

MR. WYATT: He has ability later in the year to earn money to offset that, but he wants to apply that entire amount that's due on those shipments. And those shipments have been made, have been shipped; it's just a matter of the money being remitted from his manufacturer in China.

So, no, that entire amount is available for Mr. Engle to pay. Obviously he's going to have to later in the year make up for the taxation aspects of those payments.

THE COURT: What does the government say, Mr. Martens?

MR. MARTENS: Your Honor, a few things.

First, the short answer to the question is: Until February 29th of 2008, Mr. Engle hadn't paid anything on his federal taxes that was owed. He was asked to meet on February 29th, 2008, with a revenue agent, and it was only at the request of the revenue agent, as a result of that meeting, that he made the first payment on his federal taxes in the two years since his first sentencing and the four years since his guilty plea. So in four years he's paid $480. What's what he's actually paid.

I'd also note that in this – – the loss amount in this case was miscalculated, and that's the government's mistake and we've accepted the Guideline recommendation as it is in the Plea Agreement; in the Plea Agreement and in the PSR. But I would note that his liability on which he paid $480 exceeds $2 million, and for that reason I think he should be sentenced consistent with the Plea Agreement which agrees – – there's an agreement in the Plea Agreement he would be sentenced according to the Guidelines and the Guideline range set forth in the Plea Agreement. And there's nothing in his payment history that indicates that he should be granted some type of benefit in this case.

MR. WYATT: Your Honor, I would disagree with that calculation, first of all.

The amount of taxes exclusive of interest and penalties as outlined in the documents is $620,000. The offense that's charged here is an offense, a single offense occurring in 1999, although all the 620,000 comes in as relevant conduct from 1984 until 2002. Under that scenario the Guidelines in effect in 1999 which would properly be applied here do not include interest and penalties. The Guidelines after 2001 for this offense do include interest and penalties. But given the way this case is charged and applicable Guidelines for that year, those interest and penalties should not be applied.

THE COURT: And were not arriving at 17 and two, right. 17 and one.

MR. WYATT: Correct.

But to say that -- obviously for civil purposes there's interest and penalties, but for criminal purposes we're talking about $620,000, and he's generated $120,000 to pay towards that, in addition to filing his tax returns and paying his taxes since this investigation has begun. So I would disagree with that characterization of the situation.

He also had to pay back over the last two years over $500,000 and he did that. And if that doesn't evidence an ability to pay these taxes to make the government whole, then I don't know what does.

He's done the best he can under the circumstances, and he has the ability, clearly the ability, to repay every cent the government is owed in terms of this criminal case, as well as any civil proceedings that may ensue.

THE COURT: So what do you want, blood or money?

MR. MARTENS: We want what the Plea Agreement agreed to, which is as Guideline sentence.

THE COURT: Blood. Because if I take away his income, you're not going to get it. I mean, you're aware of that?

MR. MARTENS: We're aware of that, Your Honor.

THE COURT: 17 and one is a 24-month -- is the bottom of the Guidelines. What do you say I should do, Mr. Wyatt?

MR. WYATT: I think you should do something similar to what you did at the last hearing, Your Honor, which is impose some type of either condition of probation or community confinement that allows him to work and repay these monies but at the same time penalizes him in terms of some type of community confinement or house arrest.

The problem with the sentence the last time was that the Bureau of Prisons would not allow him to travel to China if he had community confinement. If he had probation with a condition of electronic monitoring or home arrest for that same period of time, he could travel and do that.

This is a case where that type of sentence, we contend, is very just and appropriate, especially with a individual. He has worked as hard as he can to pay off these debts and to generate the funds necessary to repay the government in these circumstances.

The other thing is, Your Honor, the money that was not paid in taxes in those previous years didn't go to any sort of self-aggrandizing lavish lifestyle.

As the Court notes from the sentencing brief, Mr. Engle has been married and divorced three times and is on his fourth marriage. He obviously never considered the possibility of a prenuptial agreement, but through that time he lost three houses. He has supported his children at that time, putting four of them through college. And in addition to that, has incurred great expenses with

his most recent marriage and taking care of one of his stepchildren.

And so the issue was really a money management issue as much as anything. Clearly he engaged in deceptive conduct. Clearly he didn't pay his taxes. Clearly he took intentional acts not to do that. But this is not someone who was doing it really for himself in terms of needing the money to provide for his family. Every child he had, Laura and Beth and Aaron, he was a father involved in their lives. He paid every bit of child support required. He was the one who put them through college and paid their tuition. And so this is not a case where he was cheating the government just so he could have a nice vacation.

So we ask the Court to look at all of these facts involved in this case and sentence Mr. Engle as the Court deems appropriate.

THE COURT: Mr. Engle, you have a right to address the Court on your own behalf. Do you have anything you want to say?

THE DEFENDANT: Yes, sir.

First I want to thank the Court for it's patience and considerations. And secondly, and most importantly, I offer my sincerest apologies not only to the Court but to the government for my actions. And thirdly, I would like to tell you that given the opportunity, I will repay every cent.

THE COURT: All right. I'm satisfied that 17 and one is an accurate representation of the

Guidelines computation based on the $620,000 taxes, not including penalties and interest, because that's the appropriate computation based on the Guidelines at the time.

The Court also has to consider what to do to impose a sentence sufficient but not greater than necessary to comply with the purposes set forth in paragraph 2 of 3553(a).

In considering the nature and circumstances of the offense and the history and characteristics of the defendant, I believe that the characterization that Mr. Wyatt puts forward of this being more of a money management issue that anything else, the issue that I face as judge in trying to deal with this is to try to apply these factors in a way that appropriately punishes Mr. Engle but does not destroy his ability to pay that money.

I find that a very difficult proposition because I think that there is a need to reflect the seriousness of the offense. I'm concerned that I'm not hearing and effort to try to balance this out other than let's put him in jail and take away his livelihood, which will destroy the ability of the government to collect the money. I don't see how that necessarily promotes respect for the law.

Anything at all that happens to make him pay money affords some deterrence to criminal conduct. I don't see any need to protect the public from further crimes of the defendant. He has not need for vocational training or other correctional treatment unless, of course, I were to order him incarcerated, in which case he would need the vocational training.

As to the kind of sentences available, I believe a sentence of incarceration or probation and anything in between seems to me to be available.

I have considered the Guidelines. The 17 and one reflects the original objection about overstating – – that the two overstate his criminal history, and so 17 and one seems to me to be entirely appropriate.

It likewise seem to me to be appropriate to come up with a variance that would reflect this man's ability to pay this money. And I think that considering all of that – – I don't see any unwarranted sentencing disparities. Look at the *Gall* case. This isn't a particularly terrible, seems to me, variance. It seems to be, then that the sentence I originally thought about: Which was four years probation, 18 months house arrest on electronic monitoring with work release, and he will be permitted to make trips to China as demanded by his employer.

I'm considering the matter, in addition however, to the standard conditions, I want the $25,000 that he's got paid immediately, and I want the $100,000 upon receipt paid immediately to the Internal Revenue Service.

MR. WYATT: The $25,000 is in my trust account, Your Honor.

THE COURT: Well, if you would appropriately disburse that money to – – how do you want all that paid? Internal Revenue Service? You want it paid into the court? What do you want done with it?

MR. MARTENS: To the Internal Revenue Service.

THE COURT: All right. You can make it payable to the Internal Revenue Service and make sure it's delivered to Mr. Martens so he can get it to them in the appropriate – – as soon as the 100,000 comes in. That is the condition of his probation, that those funds be paid. And when will the 100,000 come in.

MR WYATT: It should be no more than 60 days, Your Honor.

THE COURT: Okay. Within 90 days he's to pay an additional $100,000.

I'm not going to order restitution other than that because I think the Service has adequate means to do that.

I would encourage you, Mr. Wyatt, to get with the Service and with your client to see how these – – what kind of things can be done to ease the ability to recover those funds. And that's what I propose to do.

Is there any reason – – I meant I understand the government's position. I understand the need to punish people appropriately, but I think serving this probationary term, he's going to be reporting to his probation officer. He can't leave the district without permission. He can't even change jobs without permission.

You understand that you're on a short leash with these folks. And you're to get with them – – when does he need to report to the probation officer?

MR. DUNNE: In the morning, sir.

THE COURT: Tomorrow morning.

MR. DUNNE: Yes. Sir.

THE COURT. All right. You'll receive directions for where they are, where to go and where to meet with them. And that's what I'm going to do.

The government has the power to – has the ability to appeal the sentence. Mr. Engle, I don't know whether they will or not. I believe it is appropriate under all of the circumstances, and that's what I'm going to do.

Anything else counsel?

MR. WYATT: No, Your Honor.

MR. MARTENS: No, sir.

(Hearing concluded.)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA

CERTIFICATE OF REPORTER

I, JOY KELLY, RPR, CRR, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

S/JOY KELLY

JOY KELLY, RPR, CRR **Date**
U.S. Official Court Reporter
Charlotte, North Carolina